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Obvious error in approach to default costs assessment

Costs assessment – approach to costs assessment under UCPR r708 when no objection to costs statement – items disallowed for lack of particularity – whether disallowance for lack of particularity constitutes correction of obvious error

The decision of Henry J in *Ginn & Anor v Ginn; ex parte Absolute Law Lawyers & Attorneys* [2015] QSC 49 provides clarification of the approach to be taken on a default costs assessment under r708 of the *Uniform Civil Procedure Rules 1999* (UCPR).

Facts

On 2 July 2014 Mr Ginn was ordered to pay on the indemnity basis the applicant's costs of its appearance. The applicant served its costs statement under r705 of the UCPR on 11 July 2014, claiming \$8569.50. Mr Ginn did not serve a notice of objection under r706.

On 28 October 2014 the registrar made an order under r710 of the UCPR for the completion of a costs assessment, and also appointed a costs assessor.

The assessor disallowed several items in the costs statement, essentially on the basis that insufficient particularity had been provided for those items. The costs assessor issued a certificate in which he allowed \$5016.10.

The applicant sought a review under r742 of the UCPR to vary the costs assessor's certificate so as to allow the disallowed items.

Legislation

Rule 705 of the UCPR requires a party entitled to be paid costs to serve a costs statement in the approved form on the party liable to pay the costs. The costs statement must contain sufficient details to enable the party liable to pay the costs to understand the basis for the costs, prepare an objection to the costs statement and obtain advice about an offer to settle the costs: r705(2)(a).

Rule 708 of the UCPR limits the scope of a costs assessment in circumstances in which no objection is taken to a costs statement. It provides:

708 (1) This rule applies if—

- (a) a party served with a costs statement does not serve a notice of objection under rule 706; and
- (b) the party who served the costs statement files an application for a costs assessment under rule 710.

(2) On the filing of the application, the registrar must appoint a costs assessor to assess costs under this rule.

(3) The costs assessor must, on proof that the costs statement was served on the party liable for the costs—

- (a) assess the costs without considering each item and by allowing the costs claimed in the costs statement; and
- (b) issue a certificate of assessment.

(4) However—

- (a) despite subrule (3)(a), the costs of attending the assessment of costs are not allowable; and
- (b) subrule (3)(a) does not prevent the costs assessor correcting an obvious error in the costs statement.

(5) Rules 711, 712 and 721 do not apply to an assessment of costs under this rule.

Analysis

Henry J noted that r708(5) makes r721 (Discretion of a costs assessor), which sets out a range of matters that ordinarily must be considered by a costs assessor in assessing costs, inapplicable to a costs assessment under r708. His Honour regarded this as consistent with r708(3)(a) and explained the effect of that subrule to be that, save for correcting an obvious error, the assessor “must” allow the costs claimed in the costs statement.

It was accordingly necessary to determine whether the disallowance for an item for insufficient particularity came within the meaning of “correcting an obvious error”.

Henry J considered how the requirement of r708 that the costs be assessed “without considering each item” should be reconciled with the entitlement to correct an obvious error as part of that process. His Honour regarded it as apparent that it was the considered scrutiny of each item required by r721 on an assessment for which there had been a notice of objection which was precluded, while perusal of “each item” to check for obvious error was permissible. He suggested examples of obvious errors that may be exposed on such perusal. These included:

- an obvious mathematical error on the face of the statement
- a description of an item from which it could be inferred the item had obviously been included by mistake
- an amount claimed for an item which was on its face so obviously out of proportion to the item described as to compel an inference of obvious error in quantifying the amount claimed.

His Honour found that in concluding here that the items in issue did not include sufficient particulars, the assessor was not merely perusing the claim to check for obvious error but was engaging in consideration of the items contrary to r708(3)(a).

There was a submission for the costs assessor, appearing to assist the court and not to agitate for a specific outcome, to the effect that an assessor's perusal of a costs statement to check for obvious error may be so constrained by the statement's lack of particularity that the lack of particularity was itself an obvious error. The submission placed emphasis on r705(2)(a), and was in effect that the failure to comply with r705(2)(a) would constitute an obvious error within the meaning of r708(4)(b).

Henry J rejected that submission. His Honour noted that its premise was that the assessor would scrutinise whether the adequacy of detail of each item in the costs statement was sufficient. In his Honour's view, such consideration was precluded by r708(3)(a), and was inappropriate for a situation in which there had been no notice of objection by the party liable to pay the costs.

His Honour explained that it was the interests of the party liable to pay the costs which r705(3)(a) was calculated to protect. The question whether the details required by that subrule were provided depended not on whether the bill on its face was objectively sufficient, but whether the information in the bill, supplemented by what was objectively known to the client, was sufficient for the client to make an informed decision on seeking an assessment of costs. He said (at [33]-[34]):

"Any concern as to whether a statement of costs contains sufficient detail for the party liable to understand the basis for it and prepare an objection must logically fall away in circumstances where that party is properly served with a costs statement and elects not to object to it. In such circumstances it is hardly to the point that a costs assessor would have preferred that the costs statement contain more particularity.

"It is the very fact that the party served with the costs statement elects not to object which triggers an assessment process that expressly precludes the costs assessor from considering each item."

Henry J found it could not be concluded there existed an obvious error as to the sufficiency of detail in the statement. His Honour varied the decision of the costs assessor to allow the items which had been disallowed.

Comment

The decision will overcome misconceptions which appear to have been held by some costs assessors as to the correct approach to a default assessment under r708 of the UCPR.

Here the costs assessor had clearly approached the assessment on the basis that each item in the costs statement should be considered. In a letter to the applicant, he had said:

"From their reading of r708(3) ... some solicitors are left with the impression that the default assessment is just an automatic rubber stamp for the contents of the costs statement. This assumption is incorrect, and was never intended."

Further, in the course of the assessment, the costs assessor had expressed concern that insufficient particulars were contained in the costs statement, and forwarded to the applicant a copy of the decision in *Clayton Utz Lawyers v P & W Enterprises Pty Ltd* [2011] QDC 5.

The decision in *Clayton Utz Lawyers* involved a determination as to whether invoices delivered by a solicitors' firm were itemised bills, as defined by sections 6 and 300 of the *Legal Profession Act 2007* (Qld). It held that it was necessary that the itemised bill state in detail how the legal costs were made up in a way that would allow them to be assessed under s341 of that Act. As Henry J observed, that decision has no direct relevance to an assessment under the UCPR; on such an assessment there is no obligation on the costs assessor to consider the matters in s341 of the *Legal Profession Act*.